Supreme Court, U.S.
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No. 01-1418

IN THE

Supreme Court of the United States

A. ELLIOTT ARCHER AND CAROL A. ARCHER,

Petitioners,

v.

ARLENE L. WARNER,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a promissory note given in settlement of pending litigation can constitute a nondischargeable debt "for money, . . . or an extension, renewal, or refinancing of credit, . . . obtained by false pretenses, a false representation, or actual fraud," within the meaning of 11 U.S.C. § 523(a)(2)(A), where the parties executed a settlement agreement and general release of all claims of fraud or misrepresentation underlying the litigation and all future claims arising from the same facts, where debtor has neither admitted nor been found to have engaged in fraud in connection with the events underlying the litigation, and where the creditor has failed to allege fraud in connection with the procurement of the settlement.

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RESPONDENT'S BRIEF IN OPPOSITION

The petition for certiorari should be denied. The decision below is a careful, narrow, and correct application of § 523(a)(2) of the Bankruptcy Code. It does not conflict with decisions of the Eleventh and D.C. Circuits. Material differences of fact explain (and justify) differences in outcome in these cases. Nor does the Fourth Circuit's decision conflict with this Court's holding in *Brown v. Felsen*, 442 U.S. 127 (1979). The question whether, and under what circumstances, § 523(a)(2) renders settlement debts nondischargeable should be allowed to percolate until a true conflict emerges, if it ever does.

STATEMENT OF THE CASE

A. Statement of Facts

Petitioners sued Leonard Warner and Warner Manufacturing, Inc. in 1992, alleging that Leonard Warner had misrepresented the financial condition of Warner Manufacturing and caused Petitioners to overpay when they purchased the company. Pet. App. 2a. The State of North Carolina also pressed criminal charges (later dismissed) against Leonard Warner as a result of the transaction. *Id.* at 3a. In March 1994, Petitioners amended their complaint to add Respondent Arlene Warner as a defendant. *Id.* at 2a. On May 8, 1995, Petitioners amended their complaint to state claims for "intentional and negligent infliction of emotional distress." *Id.* Three days later, and before the Superior Court of Guilford County, North Carolina had issued any merits ruling in the case, the parties settled. *Id.*

The settlement agreement contained general and mutual releases of all pending and future claims among the parties. *Id.* at 3a. Specifically, Petitioners released "any and every right, claim, or demand which [the Petitioners] now have or might otherwise hereafter have . . . arising out of or related to the matter in Guilford County Superior Court, excepting only

obligations under a Note and deeds of trust executed contemporaneously herewith." *Id.* at 9a, 34a. In the settlement agreement, "neither party admitted liability or wrongdoing." *Id.* at 3a. In exchange for the release, Petitioners were to receive—and did receive—an immediate $200,000 cash payment, and a $100,000 promissory note payable in two installments and secured by deeds of trust on the Warners' home and a commercial building. *Id.* at 2a, 19a.

When the Warners failed to make payment as due under the promissory note, Petitioners filed suit on the note in state court. *Id.* at 3a. While the suit was pending, the Warners filed for relief under Chapter 13 of the Bankruptcy Code in the United States Bankruptcy Court for the Middle District of North Carolina. *Id.* The Warners' Chapter 13 case was later converted to a Chapter 7 case. *Id.*

B. The Proceedings Below

Petitioners filed an adversary proceeding in the bankruptcy court to recover the amount due under the promissory note. Pet. App. at 3a. They also sought a determination that § 523(a)(2)(A) of the Bankruptcy Code—which makes nondischargeable a debt incurred as a result of "an extension . . . of credit, . . . obtained by . . . false pretenses, a false representation, or actual fraud"—prevented the promissory note debt from being discharged. *Id.* at 3a. Petitioners asserted as grounds for nondischargeability the same allegations contained in their state court action against the Warners. *Id.* at 4a. More than a year after filing the adversary proceeding, Petitioners attempted to amend their claim to allege that the settlement itself had been procured fraudulently, but the bankruptcy court rejected this request as untimely. *Id.* at 4a n.4.

Leonard Weaver consented to a judgment of liability under the promissory note, under which the obligation would be nondischargeable as to him. *Id.* at 39a-41a. Respondent Arlene Warner did not, and asserted as a defense that the

settlement agreement and two releases executed by the parties in the state court suit prevented Petitioners from relying on those allegations to support a nondischargeability claim. *Id.* at 5a-6a.

The bankruptcy court found that the settlement agreement contained "broad language [that] include[d] the release of any claims which the [Petitioners] 'might otherwise hereafter have.'" *Id.* at 35a. It held that, "[h]aving agreed to the settlement and the broad release granted to the defendants, and having received the cash payment of $200,000.00 as well as the promissory note and deeds of trust, the [Petitioners] may not now raise the dischargeability claim they now assert based upon the same allegations and claims contained in the complaint in their original actions." *Id.*

Petitioners appealed to the district court, which affirmed. The district court held that "the bankruptcy court correctly concluded that the settlement agreement and general release created a novation, substituting a contract debt for a debt arising from tort, and that the debt was therefore dischargeable in bankruptcy." *Id.* at 21a. Although the district court acknowledged a "split of authority" (*id.*) as to the dischargeability of settlement debts in various circumstances, it found the present case "markedly similar" to the Seventh Circuit's decision in *In re West*, 22 F.3d 775 (7th Cir. 1994) and "readily distinguishable factually" from decisions of the Eleventh and D.C. Circuits in *Greenberg v. Schools*, 711 F.2d 152 (11th Cir. 1983) (*per curiam*) and *United States v. Spicer*, 57 F.3d 1152 (D.C. Cir. 1995), respectively. Pet. App. at 22a. *Greenberg* did "not [involve] a waiver and release of the underlying fraud claim, while the settlement agreement in the instant case contains such a release from further liability." *Id.* *Spicer* involved "a post-conviction settlement while the present case involve[s] a pre-litigation settlement" where there has "been no determination of fraud or even a presentation of evidence on the issue at the time of settlement." *Id.*

The district court emphasized that a party may "ensure that a debt for [alleged] fraud does not become dischargeable in bankruptcy after the parties settle the claim" by "mak[ing] the debtor admit to specific allegations of fraud as findings of fact in the settlement agreement," "mak[ing] the debtor acknowledge that any release of liability is conditional until full payment is made," and/or "subject[ing] [the settlement] to plaintiff's right to assert non-dischargeability in a bankruptcy proceeding." *Id.* at 24a. Petitioners had offered no good reason "why parties cannot bargain to account for the contingencies of liability in any given case." *Id.*

The Fourth Circuit likewise affirmed. It held that the "bargained for agreement and release" "announced the complete waiver of all pending and future related personal claims against Arlene Warner." *Id.* at 9a. Because the settlement "completely addressed and released each and every underlying state law claim," the Fourth Circuit found the case similar in all material respects to decisions of the Seventh and Ninth Circuits and held that the settlement and release "extinguished [Petitioners'] subsequent non-dischargeability claim under Section 523(a)." *Id.* at 10a. Judge Traxler dissented, arguing that the court should follow the D.C. Circuit's *Spicer* decision and conduct "the fullest possible inquiry into the nature of the debt and limiting relief to the honest but unfortunate debtor." *Id.* at 14a.

REASONS FOR DENYING THE WRIT

Petitioners ask this Court to find in § 523(a)(2) a duty on the bankruptcy court to act, at a creditor's request, as a sort of inquisitor general by resurrecting and adjudicating the factual allegations of settled litigation. In this case, they urge that § 523(a)(2) requires the bankruptcy court to revive and to determine the merits of a claim of fraud that was released unconditionally in exchange for a cash payment, a promissory note, and two deeds of trust. Petitioners argue that the debt embodied in the promissory note is nondischargeable even

though they failed to make any timely claim of fraud in connection with the procurement of the settlement, and there has been no admission or judicial finding of fraud on the part of the Respondent.

The Fourth Circuit's decision neither creates nor is part of any split of authority meriting this Court's attention. The Fourth Circuit's reasoning and result are entirely consonant with the two circuit court decisions that present materially identical facts—the Seventh Circuit's *West* decision and the Ninth Circuit's decision in *In re Fischer*, 116 F.3d 388 (*per curiam*), *amended*, 127 F.3d 819 (9th Cir. 1997). Indeed, Petitioners do not assert to the contrary. And the decisions of the Eleventh and D.C. Circuits that are allegedly in conflict are likewise fully consistent with the decision below in view of material factual differences among them. For similar reasons, the decision below does not conflict with this Court's decision in *Brown v. Felsen*, 442 U.S. 127 (1979). Finally, the Fourth Circuit's decision encourages settlement by empowering parties to define the terms of their settlement agreements.

I. THE DIFFERENT OUTCOMES REACHED BY THE CIRCUIT COURTS ARE FULLY RECONCILABLE BASED ON MATERIAL FACTUAL DIFFERENCES AMONG THE CASES

Petitioners suggest (Pet. at 6) that there is a "square, acknowledged, and mature split among the circuits" on the issue at hand. That issue, to state it precisely, is whether following settlement and express release of a denied and unadjudicated fraud allegation, the court handling the bankruptcy of the settlement debtor must inquire into the merits of that fraud allegation to determine whether the note should be held to be nondischargeable. Petitioners suggest that, while the Seventh and Ninth Circuits share the view taken by the Fourth Circuit here, the Eleventh and D.C. Circuits would have resolved this case differently.

Respondent says "suggest" because Petitioners ignore the factual nuances of the present case, and treat as indistinguishable all cases where "an otherwise nondischargeable debt" is the object of a settlement agreement. Pet. i (Questions Presented)

While a number of cases take note of the "conflict" urged by Petitioners, on closer examination it is clear (as the district court observed explicitly below (Pet. App. 22a-23a)) that the different outcomes reached in the circuit court decisions cited by petitioners are fully reconcilable by the materially different facts present in those cases. At most, it can be said that the authorities reflect a measure of confusion on the proper approach to the widely varying circumstances in which a claimant in bankruptcy seeks to have an agreed settlement payment treated as nondischargeable. In particular, each of the two cases on which petitioners rely for their circuit conflict is sharply distinguishable from the facts of this case. Neither suggests that it is the office of the bankruptcy court to make its own inquiry into the unresolved merits of the underlying fraud claim which petitioners have elected to categorically release as part of a good faith settlement of disputed litigation. Until there arises a square conflict among the holdings of circuit court cases, this Court should follow its usual practice of denying certiorari and allowing the issue to be clarified by further litigation.

A. The Eleventh Circuit's *Greenberg* Case, Holding That A Claim For Fraud By A Fiduciary Must Be Considered In Bankruptcy Where A Settlement Agreement Never Released The Underlying Claim, Is Fully Consistent With The Decision Below

One line of authority alleged by Petitioners to conflict with the decision below, and with the decisions of the Seventh and Ninth Circuits, concerns settlement of a dispute involving a fraud allegation that obligates the settling party to pay a sum on money, but does not include any express release or waiver

of the underlying fraud claim. That situation is presented by the Eleventh Circuit's decision in *Greenberg v. Schools*, 711 F.2d 152 (11th Cir. 1983) (*per curiam*). In that decision—a *per curiam* affirmance on the basis of the district court's final judgment— a suit between business partners alleging that one misappropriated corporate funds in violation of a fiduciary duty was settled prior to trial. The settlement agreement required execution of a promissory note, and the defendant, Schools, had made several periodic payments on that note. When Schools failed to make subsequent payments, plaintiff Greenberg brought a second suit on the promissory note, which was settled by stipulation of the parties, with Schools agreeing again to monthly payments in a reduced amount. Thereafter, Schools filed a petition in bankruptcy, and Greenberg filed a claim of nondischargeability under § 523(a)(4).

The trial court rejected the argument "that once the parties entered into a good faith settlement agreement, that agreement effectively extinguished the underlying action for fraud." 711 F.2d at 154. The court stated that the interpretation urged by the debtor "would allow a debtor to discharge a debt incurred by his own fraud by simply entering into a settlement agreement prior to declaring bankruptcy." *Id.* Noting with precision the "limited" nature of its ruling, as addressing (and rejecting) "only the contention that the settlement agreement serves to automatically extinguish the appellant's claim" of fraud by a fiduciary, *id.* at 156, the court concluded that the bankruptcy court should make inquiry into the factual circumstances of the underlying fraud claim.

Nowhere in any of the decisions in *Greenberg* is there any suggestion that the underlying fraud allegations had been released by the creditor as part of the settlement agreement. To the contrary, as noted by the Seventh Circuit in *West* (*see* 22 F.3d at 777), the bankruptcy court in *Greenberg* expressly stated that it "[could] not find that a novation occurred whereby the promissory note was explicitly substituted for the

cause of action." *In re Schools*, 14 B.R. 953, 955 (Bankr. S.D. Fla. 1981), *vacated on other grounds*, 21 B.R. 1011 (S.D. Fla. 1982). It appears that the creditor in *Greenberg* simply dismissed the pending litigation in exchange for the note, and that no release was granted. *Id.* at 954-55.

Absent an unconditional release, as the Seventh Circuit concluded in *West*, the claim of fraud remains open to a claimant in bankruptcy in the event that the contractual terms of the settlement are not realized. Whereas the settlement was effected in order to resolve the underlying disputed claims, the mere fact of the settlement does not, as the court in *Greenberg* stated, "automatically extinguish" the fraud claim that brought it about. In order to extinguish such a claim, the parties must enter into an agreement doing exactly that. That was done in this case; it was not done in *Greenberg*.

B. The D.C. Circuit's *Spicer* Decision, Holding That Debts Should Be Nondischargeable In Bankruptcy Where Based On Conduct Found In A Prior Proceeding To Be Fraudulent, Is Also Entirely Consistent With The Decision Below

The second line of authority alleged by Petitioners to conflict with the decision below, and the decisions of the Seventh and Ninth Circuits, involves settlement of a dispute in which the debtor has admitted, or a court already has found, that he engaged in fraudulent conduct. That situation is presented by the D.C. Circuit's decision in *United States v. Spicer*, 57 F.3d 1152 (D.C. Cir. 1995). Spicer pled guilty to a count of interstate transportation of money obtained by fraud, admitting that he had, on at least 81 occasions, fraudulently overstated to the Department of Housing and Urban Development down payments made by home buyers in order to help those buyers qualify for FHA-insured mortgages. *Id.* at 1154. In connection with the criminal action, the United States also had brought a civil suit against Spicer under the False Claims Act and a common-law fraud theory. *Id.* Spicer

agreed to settle the civil suit, promising to pay the government $339,000 plus interest in exchange for a deletion of a restitution order from Spicer's criminal sentence and a release of the government's civil claims against him. *Id.* Some months later, Spicer filed a Chapter 7 bankruptcy petition and sought to discharge his settlement debt. *Id.* The government argued that the debt was nondischargeable under § 523(a)(2)(A). *Id.* The D.C. Circuit held that it could not adopt a rule "under which, through the alchemy of a settlement agreement, a fraudulent debtor may transform himself into a nonfraudulent one, and thereby immunize himself from the strictures of § 523(a)(2)(A)." *Id.* at 1155.

The D.C. Circuit's concern that a debtor, whose underlying "debt to the government did indeed 'originate from' and 'derive from' his fraudulent conduct," not be allowed by the simple expedient of recasting the "legal form of that obligation . . . [to] transmogrify its essential nature so as to immunize it from the command of § 523(a)(2)(A)" is simply not implicated by cases like the present one. *Id.* at 1157. To hold that a bankruptcy court should not turn a blind eye to adjudicated or admitted fraud in determining dischargeability is *not* to hold that a bankruptcy court must determine the merits of an unadjudicated or denied claim of fraud that the creditor voluntarily and unconditionally relinquished in a good faith settlement of litigation supported by valuable consideration. Nothing in *Spicer* can be said to establish such a rule. And, in this case, there has been no judicial finding of, or admission of, fraudulent conduct by Respondent. To the contrary, in the settlement and release, "neither party admitted liability or wrongdoing" (Pet. App. 3a) and the settlement clearly released all claims except for those that the parties might assert against each other arising from "obligations under a Note and deeds of trust executed contemporaneously herewith" (*id.* at 9a). Thus, following the release, the *only* basis for continuing liability against the Warners arose from the settlement agreement.

II. THE DECISION BELOW IS FULLY CONSISTENT WITH THIS COURT'S DECISION IN *BROWN V. FELSEN*

Petitioners acknowledge (Pet. 10) that there is no direct conflict between the decision below and this Court's decision in *Brown v. Felsen*, 442 U.S. 127 (1979). Instead, they contend (Pet. 11) that the decision below "clash[es]" with "principle[s] announced in *Brown*." It does not.

In *Brown*, this Court held that *res judicata* principles do not confine a bankruptcy court to reviewing only the judgment and record in a prior state court proceeding when inquiring whether the conduct underlying a debt found to exist in that prior lawsuit was fraudulent, where there had been no prior determination or stipulation that the conduct was fraudulent. 442 U.S. at 138-39. The *Brown* petitioner had alleged in a state court action that the respondent had fraudulently induced him to sign a guaranty agreement. *Id.* at 128. The state suit was "settled by a stipulation," and "[n]either the stipulation nor the resulting judgment indicated the cause of action on which respondent's liability to petitioner was based." *Id.* There was neither a release of the fraud claim nor a finding that the underlying conduct was or was not fraudulent. Upon the respondent's bankruptcy, the petitioner sought to establish that the respondent's debt was nondischargeable. *Id.* at 130. The Court held that *res judicata* principles could not prevent the bankruptcy court from conducting a "full[] . . . inquiry" into the nature of the conduct underlying the debt. *Id.* at 138.

Importantly, however, the Court did not hold that it would be proper to allow a party that has voluntarily, and expressly, released an alleged fraud claim to resurrect that claim in the bankruptcy court or to compel the bankruptcy court to pursue claims so released. In other words, while *Brown* certainly speaks to the appropriate scope of a properly instituted inquiry into the conduct underlying a debt, *Brown* does not remotely suggest that such an inquiry is required—or even

proper—where a claimant has completely relinquished his fraud claim. *See Fischer*, 116 F.3d at 391 (*Brown*'s "'res judicata' [holding] do[es] not control our case, which involves a voluntary agreement between two parties that created a novation, releasing either side from liability arising from the original contract"). Thus, there is no tension, much less any conflict, between the decision below and *Brown*.

Furthermore, *Brown* itself left open the issue whether the "narrower principle of collateral estoppel" might foreclose a bankruptcy court from inquiring into "questions actually and necessarily decided in a prior suit." 442 U.S. at 139 n.10. Settlements may occasion collateral estoppel effects if "it is clear . . . that the parties intend their agreement to have such an effect." *Arizona v. California*, 530 U.S. 392, 414 (2000). Federal courts have often found that a general release contained in a settlement of a state court action bars subsequent federal action on the same claims. *See* 18A C. Wright, *et al.*, *Federal Practice and Procedure* § 4443, at 268-70 (2002) (collecting cases). Here, Petitioners agreed to "release and forever discharge" the Warners "from any and every right, claim, or demand which [Petitioners] now have or might otherwise hereafter have [against the Warners] arising out of or relating to the matter of the litigation in Guilford County Superior Court . . . ." Pet. App. 34a-35a. On its face, therefore, the release reflects the parties' intent to preclude any future litigation of the claims settled. *Brown* may be inapposite for this separate and independent reason.

III. BY LEAVING IT TO THE PARTIES TO DEFINE THE TERMS OF THEIR SETTLEMENT AGREEMENTS, THE DECISION BELOW ENCOURAGES SETTLEMENTS

Petitioners argue that the decision below creates "an obstacle to settlement" of fraud allegations whenever a plaintiff perceives a risk of subsequent bankruptcy by a defendant, since parties with fraud claims may be reluctant to settle them if it means that the debt becomes dischargeable. Pet. at 11. This is wrong. Far from creating an obstacle to settlement, the decision below *encourages* settlement by granting parties the freedom to contractually order their respective obligations. Finality and certainty of obligations are obviously issues of paramount concern to a settling defendant, and, "as a logical matter, it simply makes no sense to conclude that mutual settlement will be encouraged by precluding negotiation over an issue that may be particularly important to one of the parties to the transaction." *United States v. Mezzanato*, 513 U.S. 196, 208 (1995). Under the reasoning of the lower courts in this case, the effect of a settlement on dischargeability will depend upon the freely negotiated agreement among the parties. As the district court stated, settling plaintiffs have ample means of protecting their interests in nondischargeability where they perceive a risk that the defendant may declare bankruptcy: They may "make the debtor admit to specific allegations of fraud as findings of fact in the settlement agreement," "make the debtor acknowledge that any release of liability is conditional until full payment is made," and/or "subject [the settlement] to plaintiff's right to assert non-dischargeability in a bankruptcy proceeding." Pet. App. at 24a.

Petitioners also claim that the decision below provides an incentive for unscrupulous debtors to offer "an empty promise to pay the debt," thereby "threaten[ing] to open a gaping hole" in bankruptcy law's policy to help "honest but unfortunate debtors." Pet. at 12-13. But such conduct in and of itself

amounts to fraud, and a claim of a fraudulently induced settlement may well make the debt nondischargeable. This issue was not presented in this case because the Petitioners first raised it in an untimely amendment to their adversary complaint. Pet. App. at 4a n.4, 25a. Petitioners' failure to timely claim fraud in connection with the settlement is completely understandable given that the Warners paid $200,000 of the $300,000 settlement amount prior to filing for bankruptcy (Pet. App. at 2a-3a, 25a) and given that Leonard Warner, the principal target of Petitioners' original state court lawsuit, has agreed to be responsible for the remaining $100,000. Pet. App. at 39a-41a.

CONCLUSION

For these reasons, the Archers' petition for writ of certiorari should be denied.

Respectfully submitted,

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